



The Governance Project

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Dealing with poor performance – where do trustees fit in?

Introduction

Staff in a voluntary sector advice agency have traditionally benefited from a supportive work environment where regular supervision and appraisal are the order of the day. Errors or gaps in knowledge have been seen as developmental rather than disciplinary issues and many staff has become comfortable working in what used to be a relatively relaxed atmosphere.

However, recent years have seen a dramatic shift in the working environment. The funding environment has continued to shrink and where it continues to exist has become increasingly focussed on targets, milestones and outcomes or else it has been replaced by commissioning, tenders and contracts. For instance the change by the Legal Services Commission to a system of ‘fixed fees’ for its contract holders has led to staff coming under considerable pressure to increase turnover and close cases just to maintain an agency’s cash-flow.

In the past agencies may have adopted a supportive approach to poor performing staff or chosen to ignore staff that refused to change their method or style of working to fit a more challenging situation. In the current climate poor performance or a reluctance to adopt new working practices is something that organisations can no longer maintain` as their very survival depends on being competitive and having the flexibility to meet the ever increasing demands of the sector and funders alike.

However, dealing with poor performance is stressful, time consuming and can prove to be a veritable minefield – especially if the role of Trustees in the process is not clear or overlaps with that of the director. This briefing seeks to outline best practice as a means of avoiding some of the common pitfalls in this difficult area.

What is poor performance?

The term poor performance in this context covers a wide range of issues from a member of staff with a high rate of sickness absence or lateness; it could be a refusal to accept new working practices or standards, rudeness or disruption or it may be poor quality advice, casefiles that do not meet the required standard, a low turnover or closure rate of cases if the person is a LSC contract worker – the list is far from exhaustive.

Setting the standards

Staff need to know the minimum standards of performance that are expected of them. These should be clearly set out with any changes in expectation evidenced in writing and reinforced through supervision, file reviews and appraisal. Organisations that do not set out their standards in writing or communicate any changes leave themselves wide open to challenge should a member of staff be disciplined or dismissed for poor performance.

Trustees are the ultimate custodians of the office manual and staff handbook that sets out all the organisation's policies, procedures, practices and minimum standards that are expected of all staff.

At various times Trustees may agree to the conditions of new grants or contracts which in turn may necessitate a change in working practices. Such changes are normally delegated to the Director for implementation.

As the Trustees own the standards they have a duty to ensure that they are implemented consistently using their standard processes for monitoring and that they are enforced should any issues become a disciplinary matter.

Be clear who can take disciplinary action

The Board of Trustees should have a clear scheme of delegation that sets out who is authorised to take disciplinary action and to what level. This should be contained clearly within the organisation's Disciplinary and Grievance or Capability Procedure.

The most common model is for the Director to be responsible for dealing with any disciplinary and grievance issues with the Board of Trustees only becoming involved at the appeal stage. However, as is common within the voluntary sector there is a broad range of practice, much of which is perfectly acceptable so long as the rules and parameters are made clear to both staff and the Board/Management Committee.

In many small or relatively new organisations any disciplinary action or grievances rest firmly within the remit of the Trustees who will act on reports or recommendations from the Director. As an organisation develops both in size and maturity so there would be an increasing expectation for responsibility for disciplinary action to be delegated to the Director. Delegated responsibility may be limited to initial disciplinary action or to hearing the first stage of a grievance; it may be restricted to giving a written or possibly a final written warning while leaving any action with potential for a dismissal to be handled by a panel made up from the Board of Trustees.

In each situation any appeal would always be heard by a panel comprising members of the Board/Management Committee. However, as an appeal needs to be heard by a higher authority than the one that took the initial decision it makes sense for the Chair of the Board/Management Committee not to be directly involved at an early stage. Where members of the Board/MC are involved in the initial disciplinary hearing there should always be sufficient members without any knowledge of the case to hear any appeal objectively.

If the Chair made or was involved in making the initial decision it is unlikely that a panel of ordinary Trustees would be willing to overturn a decision taken by the Chair and uphold an appeal.

At what point should Trustees get involved?

The point at which Trustees should become involved will vary according to whether the Director has delegated authority to take disciplinary action.

Where the Director has delegated authority Trustees should only get involved if and when the member of staff exercises their right of appeal. Where Trustees are responsible for the initial disciplinary/grievance hearing they would obviously need to be involved when the matter is referred to them for action by the Director.

In each case it should only be those two or three Trustees who will be sitting on the disciplinary/grievance or appeal panel that should have any involvement in the process. At no stage should the Trustees or any sub committee be asked to make a decision on whether disciplinary action should be taken or the severity of any action.

The situation can become blurred, however as it is quite common practice for the Director and Chair of the Board/MC to meet on a regular basis during which any impending disciplinary action would be reported, but this should not include discussing the case. It is very important that any discussions do not transgress into making a judgement or reaching a decision on the outcome of any disciplinary or grievance hearing.

It is also standard for a Director to include a staffing update as part of the regular Board/MC reports in which any disciplinary action taken would be listed. In organisations that have a personnel committee reports on staffing issues would normally be directed to it. A personnel committee may discuss staff performance issues but if the matter is likely to proceed to a disciplinary stage all discussion should cease for fear of tainting the process. Reports of disciplinary action, where presented, should be limited to name of the member of staff involved, the action and the reason without any detail e.g. J Bloggs issued with First Written Warning for poor performance.

What should Trustees be told?

It is important that should a member of staff wish to exercise their right of appeal against a disciplinary sanction or if a grievance is not resolved to their satisfaction that there is 'higher authority' available to hear the appeal. Where Trustees are involved in the initial hearing it is essential that some members remain 'untainted' by any prior knowledge of the event or events that have led to the disciplinary or grievance hearing.

The process can be organised in a variety of ways. Some organisations nominate two pools of Trustees; the initial disciplinary or grievance panel is formed out of the first while any appeal would be heard by a panel comprising members from the second. The Deputy Chair of Trustees or possibly the Chair of the personnel committee (where one exists) would chair the first hearing while the Chair of the Trustee Board/MC would chair the appeal. While there

are variations on this model they should all maintain the 'higher authority' for an appeal.

Clearly if Trustees from both pools were to exchange information about the case or discuss details it would be impossible for the appeal panel to hear the appeal objectively and without any preconceptions about the case. If the Trustees that made the initial decision were to pass their personal opinions about the evidence they heard to the appeal panel they would easily prejudice the panel's opinion in advance of it hearing the case.

The same principle applies to any Trustees involved in the initial hearing – if they hear snippets of information or gossip in advance of a hearing it will introduce bias. The only way of dealing with the matter objectively is for the trustees to make a decision based purely on the evidence and arguments, both verbal and written, presented to them as part of the hearing.

Conflicts of interest

Good practice suggests that a register of Trustees' interests be maintained. This usually relates to financial/business interests, place of work or other trusteeships but in the context of discipline or grievance it becomes important that any relationships (family/friends/enemies) with members of staff are declared before the selection for a panel is made.

Trustees with any conflict of interest should not be involved in any disciplinary or grievance process. If for some reason this cannot be avoided then any conflict of interest should be openly declared to all parties at the outset, giving either party the chance to object to the person's presence. Failure to observe this process could lead to accusations of bias and could effectively nullify or be a breach of procedure. If a case then proceeds to an Employment Tribunal the consequences for the organisation could, potentially, be very serious indeed.

What support should the Trustees give to a Director?

Support from the Trustees should not be taken to mean an unconditional agreement with all the Director's actions. On the one hand a Director operates within the scope of delegated authority but this is not carte blanche to take any action without reference to the Trustees.

The Trustees, ultimately, are the employer and, as previously mentioned are also responsible for setting the standards and working practices for the organisation. Therefore there needs to be regular contact between the Trustees and the Director – not just at the regular Board/MC meetings. Typically this will be through meetings with the Chair or, where issues relate to staff, with a member or members of the personnel committee where one exists.

This key support mechanism provides the facility for the Director to talk through any issues with the Chair. Getting this relationship right is crucial; the relationship needs to be transparent or it may appear that the Chair and Director are making decisions in secret or have their own agenda. However, where an organisation is in a change management situation, or it is trying to change the working ethos or culture it is essential that the Chair and Director work in tandem and support each other. Trustees will always have the power

and duty to overturn any change or decision if they find that it has not been properly reached or if it has not been carried out in line with procedures.

Support for the Director can also take the form of an insistence that procedures are followed, for instance not allowing staff to bypass the Director and make direct approaches to the Board/MC or individual Trustees. If the Chair does not support the Director or the relationship breaks down there will be conflict and the Director may not be prepared to introduce or implement any necessary changes to organisational practices. There may equally be a reluctance to take action against a member of staff for fear that the Chair or Trustees will disagree and overturn it at appeal. With the Director undermined the organisation will be left to drift without direction or to continue in old ways. This could lead to a failure to meet targets and therefore to a loss of contracts or funding and ultimately the closure of the organisation.

While the Chair may agree to the Director taking a particular course of action there should never be a discussion around the outcome or preferred outcome of that action especially where disciplinary action is being considered. Should this happen the Chair should avoid sitting on any appeal panel.

Comparison with the private sector

The voluntary or not-for-profit sector has traditionally taken a relatively easy going approach to poor performance or disciplinary matters often allowing matters to come to a head or reach crisis point or beyond before taking any action. While this is part of the ethos of the sector it can often prove detrimental to an organisation should a case end up before an Employment Tribunal. A member of staff may claim that they had never been informed about their lack of performance, or been given the chance to improve prior to being dismissed and therefore the dismissal was unfair. There is also the danger of allowing a situation to build to a point where any reaction is so severe that it becomes an over reaction.

Compare this to the private sector where misdemeanours and under performance do not pass unnoticed and will not be tolerated. There is a 'ruthlessness' and clearer singular vision that ensures such matters are dealt with expeditiously and threats of Employment Tribunals carry little fear.

Should there be something that the voluntary sector can learn from the private sector after all?

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